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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. BRENDA MCGINNIS, Defendant and Appellant.	F063776 (Super. Ct. No. BF135736A) **O P I N I O N**

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Michael E. Dellostritto and Michael G. Bush, Judges.†

Elizabeth Campbell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna, Amanda D. Cary and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Cornell, J., and Kane, J.

† Judge Dellostritto presided over appellant's suppression hearing, and Judge Bush sentenced appellant.

Following the denial of her motion to suppress evidence (Pen. Code, § 1538.5), appellant, Brenda McGinnis, pled no contest to four felonies, viz., possession of a controlled substance for purposes of sale (Health & Saf. Code, § 11378), possession of a substance containing methamphetamine while armed with a loaded firearm (Health & Saf. Code, § 11370.1, subd. (a)), possession of diazapene (Health & Saf. Code, § 11350, subd. (a)), and unlawful possession of a firearm (Pen. Code, § 12025, subd. (b)(6)), and one misdemeanor, viz., possession of drug paraphernalia (Health & Saf. Code, § 11364). The court suspended imposition of sentence, placed appellant on three years' probation and ordered that she serve concurrent one-year terms in county jail on the four felony counts and a concurrent term of 180 days on the misdemeanor count.

On appeal, appellant challenges the denial of her suppression motion. We reverse.

FACTS[1]

At approximately 12:00 p.m. on January 28, 2011, six Kern County deputy probation officers, including Officers Terry Adriano[2] and Joseph Mata, went to "318 Woodrow Avenue, Apartment A" (the apartment) for the purpose of arresting Kyra McGinnis for possession of methamphetamine pursuant to a felony arrest warrant.[3] As Adriano and the other officers approached the apartment, there was a Ford truck parked outside and appellant, who was holding a black shoulder bag, was "standing inside the

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1 We set forth the relevant facts, which we take from the hearing on the suppression motion, in the light most favorable to the trial court's ruling on the motion. (See *People v. Miranda* (1993) 17 Cal.App.4th 917, 922 ["In reviewing the denial of a motion to suppress evidence, we view the record in the light most favorable to the trial court's ruling and defer to its findings of historical fact, whether express or implied, if they are supported by substantial evidence"].)

2 Except as otherwise indicated, our factual summary is taken from Adriano's testimony.

3 For the sake of clarity and brevity, and intending no disrespect, we refer to persons with the surname of McGinnis, except for appellant, by their first names.

driver's side door which was open." Adriano introduced himself as a probation officer and stated he was there to speak with Kyra "[r]egarding a warrant." Appellant placed the bag in the truck and stated that she was Kyra's mother and that Kyra was in the apartment. She then "walked [Adriano and Mata] to the apartment," and "opened the door for [the two officers] to enter." Adriano identified himself and Mata as probation officers, and the two officers, along with appellant, entered. The officers found themselves in the living room of a one-bedroom apartment that Adriano estimated was less than 1,000 square feet in size. The bedroom was "off the kitchen"; to reach the bedroom from the living room one would "have to essentially walk through the kitchen …." There was "a door separating the kitchen from [the] bedroom." Appellant testified that the living room "has a[n] open breezeway into the kitchen."

Kyra, another woman, and a man were lying on couches in the living room as Adriano and Mata entered. Shortly after the two officers entered, Herbert McGinnis, who Adriano first saw when he (Herbert) was less than 25 feet away, "enter[ed] the living room through the kitchen and just north of what would be the bedroom." At that point, "everyone was asked … to stay where they were" and, while Adriano remained in the living room, Mata conducted a "protective sweep" of the apartment, "for officer safety."

Mata testified to the following: In conducting the protective sweep, he "scanned" the living room for a few seconds and then "proceed[ed] through the kitchen and into the … bedroom." There he saw, lying on top of a table, "two glass smoking pipes" and a "mirror with a razor blade on it." All items had "suspected methamphetamine residue" on them.

Adriano testified that Mata returned to the living room less than five minutes after beginning the sweep, at which time he informed Adriano that he had found "used glass methamphetamine smoking pipes in plain view" in the bedroom. At that point, Adriano went into the bedroom to see what Mata had found while Mata remained in the living

room. Adriano then returned to the living room, at which point, in response to his questioning, all the room's occupants "identified themselves." Appellant, in response to questioning by Adriano, also stated that she and Herbert, her husband, shared the bedroom, and that Kyra and the other woman in her apartment, Kyra's aunt, slept in the living room.

Adriano asked appellant if she used methamphetamine. She said, "Yes." Adriano asked appellant if there was methamphetamine inside the apartment "or the truck," and she said that "there might be some, but she was not sure." Adriano also asked appellant if the apartment and the Ford truck could be searched. She said, "Yes." Herbert, in response to a request by Adriano, also consented to a search of the apartment and the Ford truck, as well as another truck parked outside.

Thereafter, a search of the apartment was conducted, during which one of the probation officers found a derringer. Adriano asked appellant about the gun, and she responded that it belonged to her. Appellant also stated that there was a firearm in a safe underneath the bed in the bedroom. Adriano asked if she owned any other firearms. Appellant said, "Yes," and that they were in the Ford truck. Adriano searched the truck and found a loaded handgun. He also searched the shoulder bag appellant had placed in the truck, and in the bag he found, among other things, methamphetamine, baggies, scissors and a measuring spoon.

DISCUSSION

As indicated above, evidence was discovered and seized during both the protective sweep of the apartment and the subsequent full search of the apartment and the Ford truck. Appellant contends the court erred in denying her motion to suppress because (1) the protective sweep was improper, (2) she was unlawfully detained during the sweep, and (3) the full search of the apartment and truck could not be justified on the basis of her

purported consent because that consent was the product of the improper protective sweep and her unlawful detention.

Legal Background

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." (U.S. Const., 4th amend.) The exclusionary rule prevents introduction of evidence obtained as both the direct and indirect product of an unconstitutional search or seizure. (*Wong Sun v. United States* (1963) 371 U.S. 471, 484-485; *Segura v. United States* (1984) 468 U.S. 796, 804.)

"It is a 'basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.'" (*Brigham City v. Stuart* (2006) 547 U.S. 398, 403, quoting *Groh v. Ramirez* (2004) 540 U.S. 551, 559.) Nonetheless, this "presumption may be overcome in some circumstances because '[t]he ultimate touchstone of the Fourth Amendment is "reasonableness."'" (*Kentucky v. King* (2011) __U.S. __ [131 S.Ct. 1849, 1856, 179 L.Ed.2d 865].) "It is the People's burden to justify a warrantless search." (*People v. Schmitz* (2012) 55 Cal.4th 909, 915, fn. 4.)

There are several well-settled exceptions to the warrant requirement, one of which is the "protective sweep" rule under *Maryland v. Buie* (1990) 494 U.S. 325 (*Buie*). Under this rule, law enforcement officers may "take reasonable steps to ensure their safety after, and while making, [an] arrest [in a home]." (*Id.* at p. 334.) The high court identified two types of warrantless protective sweeps that are constitutionally permissible. In the first type, the officers may, "as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." (*Ibid.*) In the second type, officers may go beyond immediately adjoining areas and further investigate the premises, provided that there exist "articulable facts which, taken

together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." (*Ibid*.) In neither instance may the investigation be a "full search of the premises," and instead must be limited to "only … a cursory inspection of those spaces where a person may be found." (*Id*. at p. 335.)

Moreover, and as the parties assume, the protective sweep doctrine applies where, as here, the suspect was detained rather than formally arrested at the time of the protective sweep. (*U.S. v. Corrales* (9th Cir. 1999) 183 F.3d 1116 [upholding protective sweep conducted before suspect formally arrested without discussion of arrest-detention distinction]; *U.S. v. Garcia* (9th Cir. 1993) 997 F.2d 1273, 1282 [same]; *State v. Revenaugh* (Idaho 1999) 992 P.2d 769, 772 ["[t]he concern for the safety of officers which justifies allowing officers to conduct warrantless protective sweeps following the arrest of a suspect is just as applicable where the suspect has been detained while the officers attempt to ascertain the extent of the situation"]; *U.S. v. Maddox* (10th Cir. 2004) 388 F.3d 1356, 1362 ["Because the ability to search for dangerous individuals provides little protection for officers unless it is accompanied by the ability to temporarily seize any dangerous individuals that are located during the search, we conclude that detaining potentially dangerous persons for the duration of the arrest qualifies [under *Buie*] as a 'reasonable step[ ] to ensure the [officers'] safety'"].)

Analysis

The People effectively concede that there did not exist facts giving rise to a reasonable suspicion that there were persons in the apartment who posed a danger to the officers, and that therefore Officer Mata's sweep of the apartment did not qualify as the second type of protective sweep permissible under *Buie*. Rather, the People argue that the sweep in the instant case, including Mata's foray into the bedroom, qualified as the first type of permissible protective sweep, viz., a cursory search of "spaces immediately

adjoining the place of arrest from which an attack could be immediately launched," and therefore required neither "probable cause" nor "reasonable suspicion." (*Buie*, *supra*, 494 U.S. at p. 334.) The People acknowledge that the bedroom, the place in the apartment where contraband was found in the protective sweep, was separated from the living room, where appellant and the others were detained, by the kitchen. But notwithstanding this factor, the People contend, to refuse to consider the bedroom as "immediately adjoining" the living room would be to "narrowly defin[e] the 'spaces immediately adjoining the place of arrest' [from which an attack could be immediately launched] through the use of architectural constructions." The People assert that Officer Mata's entry into the bedroom was reasonable, "given the size and layout of the apartment …." We disagree.[4]

We must take the Supreme Court at its word. A bedroom separated from a living room by a kitchen cannot plausibly be said to be "adjoining," much less "*immediately* adjoining," the living room. This interpretation is not unduly narrow. It is simply the only one to which the words are reasonably susceptible. The People cite us to no case, nor are we aware of any, holding that law enforcement entry into a room separated by another room from the place of arrest was justified as a protective sweep of a space immediately adjoining the place of arrest under *Buie*.

The People place some reliance on *U.S. v. Thomas* (D.C. Cir. 2005) 429 F.3d 282 (*Thomas*). In particular, the People quote the following passage: "If an apartment is

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[4] In the proceeding below, the People argued that the protective sweep was justified as the second type under *Buie*, but did not attempt, as they do now, to justify the sweep as one of the "spaces immediately adjoining the place of arrest from which an attack could be immediately launched." (*Buie*, *supra*, 494 U.S. at p. 334.) We assume without deciding that the People are not foreclosed from raising this claim on appeal. (See *Green v. Superior Court* (1985) 40 Cal.3d 126, 138 [prosecution may be precluded from relying on a new theory on appeal to justify a search where defendant had no notice of new theory and thus no opportunity to present evidence in opposition].)

small enough that all of it 'immediately adjoins the place of arrest' and all of it constitutes a space or spaces 'from which an attack could be immediately launched,' [citation], then the entire apartment is subject to a limited sweep of spaces where a person may be found." (*Id*. at pp. 287-288.) *Thomas*, however, is inapposite.

In that case, the defendant was arrested in the hallway, "immediately inside his front door." (*Thomas*, *supra*, 429 F.3d at p. 287.) The bedroom and every other room in the residence "'could be immediately accessed from the hallway.'" (*Ibid*.) The defendant argued that "his 'place of arrest' was just the area 'inside of the front door,' not the entire hallway of which it was a part, and therefore the bedroom did not 'immediately adjoin[ ]' the place of arrest." (*Ibid*.) The court rejected the defendant's "concept of the place of arrest" as "unreasonably narrow." (*Ibid*.) Because appellant was arrested in the hallway, and the bedroom could be "'immediately accessed'" (*ibid*.) from the hallway, the extension of the sweep to the bedroom, in the absence of probable cause and reasonable suspicion of the presence of people posing a danger to the officers, was unlawful. Here, unlike *Thomas*, the living room could not be "'immediately accessed'" (*ibid*.) from the bedroom. Whereas in *Thomas* it was possible to enter the bedroom from the hallway, officers here, in order to enter the bedroom from the living room, had to walk through the kitchen. *Thomas* does not support the contention that a sweep of a room separated by another room from the place of arrest is justified as the first type of *Buie* protective search.

The instant case more closely resembles *U.S. v. Archibald* (6th Cir. 2009) 589 F.3d 289 (*Archibald*). In that case, the defendant was arrested just outside the front door of an apartment. Just inside the front door was the living room, "which was separated from the adjoining kitchen by a solid bar counter which obscured the view into the kitchen." (*Id*. at p. 293.) During a protective sweep, a police officer found illegal drugs in the kitchen, in plain view.

The *Archibald* court rejected the government's attempt to justify the search under the first *Buie* test because the government failed to present that argument below. Further, the court stated, the argument failed on the merits: "The protective sweep … did not occur within the area immediately adjoining the place of arrest.… Here, the officers swept not just the room 'immediately adjoining' the doorway, i.e., the living room, but also the kitchen …. [T]here was no indication from viewing the area immediately adjoining the place of arrest (i.e., the living room) that an attack could be immediately launched." (*Archibald*, *supra*, 589 F.3d at p. 298.)

In the instant case, as in *Archibald*, the protective sweep extended beyond the space immediately adjoining the "place of arrest" (*Buie*, *supra*, 494 U.S. at p. 334). Therefore, the People did not meet their burden of establishing the legality of the sweep. Moreover, although appellant and Herbert purportedly consented to the search of the apartment and the Ford truck, and consent is an exception to the constitutional requirement of a warrant (*People v. Woods* (1999) 21 Cal.4th 668, 674), where consent is the product of an illegal search, evidence seized as a result of the consent is subject to suppression (cf. *Florida v. Royer* (1983) 460 U.S. 491, 501 [where initial detention violated the Fourth Amendment, defendant's "consent was … tainted by the illegality," and evidence obtained as a result of the consent to search should have been excluded]). The consent to search in the instant case was the product of the unlawful protective sweep. Thus, all evidence obtained here as a result of the protective sweep, *and* evidence obtained as a result of appellant's purported consent following the sweep, should have been suppressed. The court erred in denying appellant's suppression motion.[5]

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[5] Because we reach the conclusions discussed above, we need not reach appellant's contention that she was detained in violation of her Fourth Amendment rights.

DISPOSITION

The judgment is reversed. The cause is remanded to the trial court with directions to grant appellant's Penal Code section 1538.5 motion, and vacate appellant's no contest pleas if appellant makes an appropriate motion within 30 days of the issuance of the court's remittitur. If no such motion is made, the trial court shall reinstate the judgment.